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EX PARTE OR LATE FILED

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August 6, 2002

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NOTICE OF EX PARTE COMMUNICATION

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445-12th Street, S.W.
TW-A325
Washington, D.C. 20554

Re: In the Matter of Review of the Commission's Broadcast and Cable Equal
Employment Opportunity Rules and Policies; MM Docket No. 98-204

Dear Mrs. Dortch:

On August 5, 2002, the undersigned sent the enclosed e-mail communication to
Jane E. Mago, General Counsel of the Commission.

Very truly yours,


Richard R. Zaragoza

Enclosure

cc: Jane E. Mago, w/enclosure

No. of Copies rec'd 012
List ABCDE

Richard Zaragoza
08/05/2002 06:58 PM

To: jmago@fcc.gov
CC:
Subject: FCC's EEO Proceeding

Jane:

FYI. I would be pleased to visit with you about this when you think best.

Richard R. Zaragoza
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----- Forwarded by Richard Zaragoza/SPPT/US on 08/05/2002 06:58 PM -----

Richard Zaragoza
08/02/2002 10:10 AM

To: rstewart@fcc.gov, dklein@fcc.gov, mmurphy@fcc.gov,
johnson@fcc.gov, lpulley@fcc.gov, rboyce@fcc.gov
CC:
Subject: FCC's EEO Proceeding

All:

I was very pleased to meet you on Wednesday. For your convenience, attached is a PDF copy of the Notice of Ex Parte Communication which I timely filed with the FCC yesterday, hard copies of which have also been sent to each of you. If you have any questions or believe that another meeting would be helpful, please do not hesitate to call me.



Notice of Ex Parte Communication.

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A Limited Liability Partnership Including Professional Corporations

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August 1, 2002

NOTICE OF EX PARTE COMMUNICATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445-12th Street, S.W.
TW-A325
Washington, D.C. 20554

Re: In the Matter of Review of the Commission's Broadcast and Cable Equal
Employment Opportunity Rules and Policies; MM Docket No. 98-204

Dear Mrs. Dortch:

On July 31, 2002, at the request of Roy J. Stewart, the undersigned met with Mr. Stewart, Deborah E. Klein, Mary Beth Murphy, Jamila Bess Johnson, Lewis Pulley and Roy W. Boyce, all of the Media Bureau, to discuss legal issues related to equal employment opportunity in the broadcasting industry, including the proposal of the State Broadcasters Associations (the "State Associations") which filed Joint Comments and Joint Reply Comments in the above-referenced proceeding. I thanked the Commission for holding the En Banc Hearing in the above-captioned proceeding and for including Ann Arnold on behalf of the State Associations.

At the meeting I reminded those present that the State Associations do not believe that EEO re-regulation is necessary. The meeting focused on helping the group to better understand the State Associations' concerns and ideas about any new regulations, assuming arguendo that there would be a rule. There follows a version of an EEO rule that is grounded upon the State Associations' Joint Comments filed in the proceeding and that was discussed at the meeting. Following the draft rule, there is a listing of the reasons why the State Associations believe that if the Commission insists upon re-regulating in this area, this formulation of a new EEO rule should be preferred by the Commission.

DRAFT NEW RULE 73.2080

(a) General EEO Policy. Equal opportunity in employment shall be afforded by all licensees and permittees of commercially and noncommercially operated AM, FM, TV and international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such licensee or permittee

because of race, color, religion, national origin or sex. However, a religious broadcaster (as defined herein) may establish religious belief or affiliation as a job classification for any and all station employees so long as such broadcaster does not discriminate on the basis of race, color, gender or national origin from among those who share such broadcaster's religious belief or affiliation.

(b) Specific EEO program requirements.

(1) Job Vacancy Recruitment. Each station employment unit ("SEU")(as defined herein) shall cause a majority (as defined herein) of its full-time job vacancies to be posted on the Internet using one or more websites of its choice. An SEU may not, for compliance purposes, rely upon any website that charges a special fee to a member of the public before allowing such person to access any pages of such website that contain partial or complete job vacancy information. The posting requirement herein shall not apply to any job vacancy which is subject to special circumstances (as defined herein). Each station comprising an SEU shall announce over-the-air the SEU's use of such website(s) for such postings, including the URL address(es) of such website(s).

(2) Each SEU shall cause notification of those job vacancies which it has posted on the Internet pursuant to (b)(1) above, to be provided to any eligible organization that distributes information about employment opportunities to job seekers or refers job seekers to employers, upon the written request of such organization. To be entitled to receive notice of such job vacancies, the requesting organization shall have provided in writing to the SEU (i) its name, mailing address, telephone number, fax number (if it has one), e-mail address (if it has one) as well as the name of the contact person along with that person's contact information; and (ii) a list of the category or categories of job vacancies of which it requests notice. An organization may request notice of all job vacancies that the SEU posts on the Internet. The SEU shall cause the job vacancy information to be sent to the eligible referral organization, either by mail, fax (if available) or e-mail (if available) at the SEU's option. Each station comprising the SEU shall announce over-the-air the station's willingness to provide the job vacancy information upon request to eligible referral organizations. It shall be the responsibility of the eligible organization to notify the SEU of any changes in its contact information. The SEU may stop sending the information to an eligible organization if the organization notifies the SEU that it no longer wishes to receive such information or the nonexempt SEU's communications to the organization are returned, or otherwise fail, two consecutive times.

(3) An SEU shall be deemed to have complied with the over-the-air announcement requirements of (b)(1) and (2) above if each station comprising the SEU shall have aired the contemplated announcements at least once per month between the hours of [6:00AM] local time and [10:00PM] local time during any day of the week.

(4) An SEU may use a third-party to post the job vacancy notices on the Internet and/or to provide such information to eligible referral organizations, provided that the SEU shall remain legally responsible for compliance with all requirements hereunder.

(5) If the station(s) comprising the SEU employ in the aggregate less than five (5) full-time employees, such SEU and the stations comprising such SEU shall be exempt from the requirements of (b) above and (d) below.

(c) Definitions.

(1) A "religious broadcaster" is a licensee or permittee of a commercially or noncommercially operated AM, FM, TV or international broadcast station (as defined in this part)] which licensee or permittee is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity.

(2) A "station employment unit" ("SEU") is a full service radio or television broadcast station or group of commonly owned or controlled such stations in the same market that share at least one full-time employee.

(3) A "majority" shall mean at least 50% of the full-time employees of an SEU during the calendar year.

(4) A "full-time" employee is a permanent employee whose regular work schedule is 30 or more hours per week. A "part-time" employee is a permanent employee whose regular work schedule is less than 30 hours per week.

(5) "Special circumstances" shall include, but not be limited to: promotions of internal staff; promotion of a temporary employee or a part-time employee to a full-time position in the same or substantially same position when the temporary or part-time position of such employee was previously the subject of posting pursuant to (b) above; and hires or promotions where considerations, such as lack of advance notice of departure, need for speedy replacement, unique experience/skills involved and/or need for confidentiality, make posting unworkable from a prudent business perspective in the good faith discretion of the SEU.

(d) Recordkeeping.

(1) Each SEU shall retain documentation evidencing its compliance with (b) above for a period of four (4) years. Such documentation shall be limited to: (i) copies of the job vacancy notices which the SEU posted on the Internet as well as sent to eligible referral organizations; (ii) copies of the announcements aired on the stations comprising the SEU which identified the website(s) used by the SEU for promoting its job vacancy postings as well as for promoting the availability of job vacancy information

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for eligible referral organizations; (iii) a listing of the dates and times when such announcements were aired on each station comprising the SEU; and (iv) a listing containing the names and addresses of the eligible referral organizations to whom such notices were sent.

(2) The documentation contemplated under (d)(1) shall not be routinely filed with the Commission. Nor shall it be available for public inspection. The documentation shall be available to the Commission, on a privileged and confidential basis, in the event of an audit by the Commission.

IF THERE IS TO BE A NEW EEO RULE, WHY THIS FORMULATION OF A
NEW EEO RULE SHOULD BE PREFERRED BY THE COMMISSION

1. Our proposal contains the two basic regulatory elements that the Commission is seeking to promote: nondiscrimination in employment and broad outreach in recruitment.

2. Our proposal is directly responsive to the FCC's desire that information about the majority of job openings at stations be generally available to the public at large so that people who are interested can compete for those jobs.

3. Our proposal does not require a change in the number of stations that would be exempt under any new rule.

4. Our proposal acknowledges the Internet as a proven, effective and efficient means for job recruitment and job searching, as well as provides a "safety valve" by requiring stations to place on their job vacancy "mailing lists" eligible, local organizations that may refer prospective employees to stations. Accordingly, our proposal is not an "Internet Only" idea. It is an "Internet Plus" idea. Furthermore, it is reasonable for the broadcast industry and the Commission to rely upon the Internet for these purposes. Under all iterations of the Commission's former EEO regulations, those regulations talked in terms of "qualified" persons. It is reasonable for the broadcast industry and the Commission to expect all persons actually interested in a career in broadcasting be self-motivated and have some basic familiarity with computer use and the Internet. All of these people know or should know where they can find access to a computer in order to search for jobs or to respond to job vacancy notices, particularly when, as proposed here, stations will regularly broadcast to the areas they cover notice that if a person is truly interested in pursuing a career in broadcasting such person may go to one or more specifically identified websites to search for a position in the industry. Accordingly, any resort to percentages of persons who regularly use or do not use computers or the Internet is not pertinent in this context.

5. Our proposal does not turn on whether there is a "digital divide" and, if so, when it will disappear. Our proposal does, however, challenge the Federal government,

through the FCC, to acknowledge through action, not just words, the Internet's enormous utility in the area of job recruitment and job searches. Such governmental acknowledgement will itself act as a powerful, additional driver of penetration of this technology into homes and schools throughout the country. Furthermore, the more that business and the government rely upon the Internet, whether by use or regulation, for this important purpose, the more justification that exists for the Federal, state and local governments to help fund the expansion of computer access into schools and elsewhere. In short, our proposal that the FCC specify the Internet (plus "safety value" mailings to local referral organizations) for job recruitment and job searches is wholly consistent with, and in fact makes even more compelling, the government's commitment to eliminate any "digital divide" that may exist.

6. Our proposal for Internet-initiated recruiting is no less "personal" than recruitment by newspaper, periodical or referral organization. In these cases, the applicant typically responds first with a resume or completed application and a request for an interview. Depending upon how mutually convenient a face to face meeting may be, the first personal interview may be over the telephone. Nothing prevents the applicant from including in his or her resume, completed application or cover letter, an explanation that his or her personal qualifications will enhance the work force diversity of the station. Nor is Internet-initiated recruiting inferior to the traditional job fair. In fact, in a number of respects, it is superior to the traditional job fair. For example, a person may "attend" an on-line job fair at any time of the day or night without having to travel anywhere. The on-line job fair reflects current openings, not openings that may occur in the future which is often the case at traditional job fairs and which can leave attendees disillusioned and angry. Also, if there are many attendees at a traditional job fair, the personal delivery of one's resume or application (whether completed prior to or at the job fair) is in reality an impersonal act. Lastly, in the vast majority of cases, the resume/application is the real starting point in the interview process. Our proposal gives the interested person an opportunity to control the "first impression" contact through a carefully crafted response to the job vacancy notice, including, if the person wishes, how the person's background will promote diversity at the station. This is important because a station evaluates a candidate initially on the resume/application/tape and then decides whether a follow-up telephone or in-person interview is warranted. In any event, it should be remembered that our proposal is not mutually exclusive with traditional job fairs. They will continue as an industry practice even if our proposal is adopted.

7. Our proposal avoids the arbitrary and capricious nature of the current Commission proposal which is to require stations to reach out in recruiting new employees to all "sectors" or "segments" of the community. Neither of those terms is susceptible to meaningful line drawing in this context and, for good reason, the Commission has made no effort to define a "sector" or a "segment" of the community. No broadcaster would or could know when it has done enough to comply with that requirement. Furthermore, if what the Commission intends is that broadcasters search out every conceivable racial and ethnic grouping in a community, such an intent raises

the serious question whether the Commission is really bent on causing stations to recruit on the basis of race. Under our race and gender-neutral "Internet Plus" proposal, compliance turns clearly and cleanly on the means of communications used (the Internet along with adequate over-the-air promotion) as well as job vacancy mailings to local referral organizations. If a station has followed these requirements, it knows that it has complied and that its outreach is legally broad enough from an FCC standpoint. To illustrate the problems with the Commission's approach, one can easily imagine the uncertainty, petitions to deny, backlogs, etc. that would ensue if the Commission were to modify its current requirement that stations broadcast a certain number of pre-filing/post-filing notices in connection with their renewal and transfer and assignment applications, so as to require stations to broadly disseminate notice to all "sectors" and "segments" of the community in connection with those filings. How could a renewal applicant, a proposed transferor or a proposed assignor ever know that it has fully complied? How easy it would be under that standard for a petitioner to claim that the rule has not been met in an effort to block a renewal or prevent a transfer or an assignment? That is the situation which stations will find themselves in if the Commission adopts its current formulation of broad dissemination. That situation can be avoided by our "Internet Plus" proposal.

8. Our proposal importantly reduces the number of times when a broadcaster would have to resort to any "special circumstances" exception that would need to be built into any mandatory posting rule and, as a result, our proposal reduces the likelihood of uncertainty, misunderstandings, disputes, petitions, litigation and a drain on the resources of the Commission and the broadcaster. In our Joint Comments, we proposed an "at least 50%" requirement which the Commission could adjust with the benefit of experience gathered over time. The 50% test is not unlike the "50% of parity" standard which the Commission used years ago and which the Court stated could be adjusted with the benefit of experience. Moreover the "50%" figure takes into account that it would apply to small stations as well as to large stations. The higher the percentage the greater the need to develop different percentages depending upon the number of full-time employees working at the stations comprising each SEU. In any event, the "50%" figure could be adjusted on an industry-wide basis or on station-specific basis and the State Associations are not wedded to a particular percentage. The State Associations do not believe that any adjustment in the percentage is called for at this time. By pegging the posting requirement at "at least 50%," there will be less need for the broadcaster to rely upon such an exception, thereby reducing substantially the risk of litigation on these matters. Also, by adopting the "at least 50%" standard, there should be no diminution in the tendency of broadcasters to broadly recruit for the vast majority of their openings. There are at least two reasons why this is so. First, when broadcasters have openings, they will naturally continue to have the incentive to broadly recruit (post on the Internet under this rule) the vast majority of their openings because they know that larger their pool of applicants the more likely the selection will be superior. This is common sense. Second, if a broadcaster must meet a 50% test by the end of each year, it must err on the side of posting as many openings as possible throughout the year to reduce the risk that openings

occurring toward the end of the year will place it in jeopardy of not meeting the 50% mark, thereby forcing it to rely upon, and risk litigating over, whether one or more "special circumstances" exceptions actually applied to a given vacancy. For the same reason, there is no need to apply separate posting percentages to top 4 job category positions as distinguished from all job category positions.

9. Our proposal is simple for a station to understand, follow and document and for the Commission to enforce. It avoids a menu approach that can complicate paperwork burdens for both stations and the Commission and that can raise many collateral questions requiring Commission fine-line interpretation and enforcement. For example, what constitutes the requisite "participation" in a job fair or a scholarship program sponsored by a State Association or other third party that would permit a station to claim a compliance credit? The factual permutations are virtually unlimited, as will be the disagreements and disputes that will occupy the resources of the Commission and the parties for years to come. In a colloquy between Chairman Powell and Ann Arnold at the recent FCC EEO En Banc Hearing, the Chairman expressed disbelief that any company would settle a case with a petitioner to deny unless the station were at fault. Ms. Arnold's answer was real world accurate: if the Commission gives a third party the leverage (such as blocking a renewal that may put at risk a station's financing or preventing the sale or purchase of a station) as well as some arguable basis for a claim (alleging that a station did not reach out to all "sectors" or "segments" of the community or that a station did not deserve a credit for a particular activity because its "participation" was not significant enough), the Commission's new rules will result in the same abuse as with the former rules. Under our proposal, the risk of such abuse is reduced to an absolute minimum while insuring broad outreach.

10. Our proposal does not contain an application or form "certification" requiring the licensee/permittee to swear that it has complied with the regulations. Such a certification is unnecessary and it is fundamentally unfair to require an entity to certify as to a legal conclusion. The facts that the documents identified above would have to be retained and that the Commission may review them upon audit stand as an adequate deterrent to non-compliance in this area. If a member of the public has a concern about a station's compliance in this area, it can file a complaint and the Commission can decide whether to follow-up with the station.

11. Our proposal does nothing to prevent or discourage the ongoing customs and practices of the broadcast industry, State Broadcasters Associations, the NAB and others to engage in and sponsor job fairs, scholarship programs, and other like work force development and diversity enhancing programs. These programs will continue with or without new rules because they are worthwhile in helping broadcasters to develop a continuing supply of qualified employees for a diverse work force.

12. Our proposal does not contemplate that the Commission will require the filing with the FCC of employee profile data on a station-attributed basis. Commissioner

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Copps asked Marilyn Kushak at the EEO En Banc Hearing whether the Commission should be able to review that data at renewal time. The ability of the Commission to review that data at any time, on a station-attributed basis, constitutes, in our view, legally impermissible governmental pressure on stations to hire based on race. If the results of the data are needed for a legitimate purpose, the data should be sent to an independent third-party, such as BIA, which would not be an agent of the Commission and which would be in charge of identifying to the FCC what stations have provided the data, keying in the data and providing the Commission and the public at large with a report showing national, regional and state-wide employment profile data totals (by job category, by full-time and part-time and by gender, race and ethnicity), but no employee profile data would be publicly available on a station-attributed, station employment unit-attributed or market-attributed basis.

Very truly yours,



Richard R. Zaragoza

cc: Roy J. Stewart
Deborah E. Klein
Mary Beth Murphy
Jamila Bess Johnson
Lewis Pulley
Roy W. Boyce
Susan Eid
Stacy Robinson
Alexis Johns
Catherine Bohigian